No. 288

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD, PETITIONER,

v.

ERIE RESISTOR CORPORATION,

AND

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, LOCAL 613, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT UNION

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OPINIONS BELOW

The opinion of the court below (R. 14-21) is reported at 303 F. 2d 359. The Decision and Order of the Board (R. 3a-32a) are reported at 132 NLRB 621.

STATUTES INVOLVED

This case is governed by the National Labor Relations Act, as amended, sometimes referred to herein as the Act,

Act of June 23, 1947, c. 120, 61 Stat. 136-162, as amended Sept. 14, 1959, Pub. L. 86-257, 73 Stat. 525, 542, 545, 29 U.S.C. § 151, et seq. The pertinent provisions are set forth in Appendix A, *infra*.

QUESTION PRESENTED

Does the grant and implementation of preferential seniority status for purposes of layoff and recall to certain employees based solely on the fact that they reported to work during a lawful strike violate Section 8(a)(1) and (3) of the National Labor Relations Act?

The Respondent Union contends that this question should be answered in the affirmative.

STATEMENT OF THE CASE

I. The Facts

A. *The Negotiations and Commencement of the Strike*

In February 1959, negotiations commenced between the Company and the Union to settle upon terms for a new agreement to replace the then current agreement which was to expire on March 31, 1959. The parties were unable to reach an agreement by March 31 and the Union struck. (R. 3a, 37a-38a; 231a-235a).

As of the start of the strike, the Company actively employed a total of 636 employees, of whom 478 were in the bargaining unit represented by the Union. An additional number of employees were on layoff, of whom approximately 50 had reasonable expectation of recall. All bargaining unit employees joined in the strike at its start. (R. 4a, 36a; 69a). Within a week or two after the start of the strike, without solicitation on the part of the Company, a number of applications for employment were received at the plant. Some of these came by mail. Some came from relatives of non-bargaining unit employees who continued to work at

the plant after the strike started. (R. 4a, 45a; 393a-394a). During the first month of the strike, however, the Company made no effort to employ replacements for the striking employees, but operated the plant with 140 clerical and other non-bargaining unit employees who were assigned to production duties. (R. 4a, 38a; 395a).

B. *The Decision to Hire Replacements and Grant Superseniority*

By May 2, 1959, the strike had still not been settled. Members of Company management, its negotiating committee and Company counsel met and decided that the Company would seek to hire replacements for the striking employees. At this meeting, prior to any attempt to employ replacements, there was discussion among the Company representatives with respect to the grant of some sort of superseniority to employees who came to work following the decision to hire replacements. (R. 4a, 39a; 121a, 186a, 431a-433a).

Following this meeting, the Company sent a letter to all striking and laid off employees of Erie Resistor Corporation announcing to them that the Company intended to start obtaining replacements on May 7 and that strikers would retain employment rights only until replaced. (R. 4a, 39a; 94a, 560a).

The first replacements were hired on May 11. The only qualifications required for employment were that women had to be high school graduates and men had to have some kind of work experience and make a personable appearance. (R. 45a; 365a, 392a). Upon acceptance, replacements were informed by Bertone, the Company's assistant industrial relations director, that they would not be laid off as a result of settlement of the strike (R. 4a, 45a; 120a, 416a). After replacements reported to work within the plant, they were

given the same assurance by Respondent's divisional managers (R. 4a, 41a; 435a, 454a).

On May 11, the day the first replacements started to work in the plant, Company negotiators announced to the Union that they would have to grant nonstrikers some sort of superseniority to implement the assurances given them. (R. 4a, 21a, 40a; 120a, 146a-147a, 149a, 152a). The Union negotiators indicated that they could not agree to the grant of additional seniority protection to nonstrikers because it was discriminatory and unlawful (J.A. 311a).

As negotiations continued, the Company continued to insist upon superseniority as something it wanted and had to have. (R. 21a; 120a, 202a-203a, 210a-211a). Although the Company indicated that it would negotiate as to the form superseniority might take, every form it proposed accomplished the same result. Each separated nonstrikers from strikers for purposes of layoff and recall, so that strikers with greater actual service would be laid off before nonstrikers and recalled after nonstrikers in any economic layoffs which might occur after the strike terminated (R. 5a, 41a-42a; 150a, 153a, 155a, 159a-160a, 164a-165a, 248a). Soon after the company injected the superseniority issue, it became the principal issue and obstacle to reaching an agreement and ending the strike (R. 21a; 200a, 202a, 209a, 211a, 356a).

C. *The Adoption of the Twenty Year Policy*

By the end of the week which began on May 25, 1959, in addition to the 140 employees outside the bargaining unit who were assigned to production work, thirty-nine employees on layoff status had reported for work as replacements, 8 new employees were hired, and 5 strikers had abandoned the strike and returned to work (R. 5a, 394a-345a, 522a).

On May 28, at the bargaining session with the Union, the Company informed the Union that it had settled upon a particular form of superseniority. It decided to give nonstrikers 20 years additional seniority for purposes of layoff and recall. The additional seniority was to apply to all employees newly hired during the strike as replacements, to strikers who either returned to their own jobs or returned to replace other strikers before the end of the strike, and to employees who had been on layoff when the strike started and came to work as replacements during the strike (R. 5a, 120a, 211a, 565a). The additional seniority did not apply to other employee benefits based on length of service with the Employer (J.A. 6a; 564a).[1] At this meeting Company representatives continued to insist that superseniority was a prerequisite to any strike settlement, but indicated as they did throughout the strike, that the only commitment made to nonstrikers was that they "would not be laid off on the settlement of the strike." (J. A. 209a-210a).

At a Union meeting the following day, May 29, the strikers resolved to continue the strike until the Company ceased its unfair labor practices by making the Union agree to give superseniority to nonstrikers (J.A. 6a; 274a).

On May 30 or 31, the Union mentioned the 20-year superseniority plan during a Union telecast over a local television station (J.A. 6a; 173a). However, the Company made no attempt to publicize its superseniority policy at this time, and, in fact, deemed it "confidential" (R. 6a, 344a). The Company first notified the employees who worked during the strike of the plan by its letter of June 10 (R. 6a, 173a-174a, 556a). The Company did not advertise for employees to come to work as replacements until June 17, 1959 (J.A. 46a; 114a, 555a).

[1] The 20 year plan was formulated in a statement of Company policy dated May 27, 1959 (R. 564a).

As the strike progressed, the Company continued to receive applications from prospective replacements (R. 393a). At the end of the strike the Company had a reservoir of over 300 employment applications on hand which it had not considered (R. 394a). Industrial Relations Director Ferrell stated that the Company "purposely proceeded slowly in its replacement program so as to preserve, if possible, a continuity of employment." (R. 6a, 45a; 173a). Ferrell indicated that the Company could have replaced all its employees if it had so desired (R. 345a).

During the entire period of the strike, the City of Erie was classified by the United States Department of Labor as an F surplus area. This designation indicated the greatest labor surplus classified by the Labor Department, at least 12% unemployed (R. 6a, 46a; 187a-189a, 584a).

During the months of May and June, employees entered the plant in increasing numbers (J.A. 7a, 15a; 368a, 395a, 522a). Employees who had been in layoff status at the start of the strike began to report for work in substantial numbers as soon as the Company started to hire replacements. They were considered as permanent replacements for strikers. The 140 non-bargaining unit employees reported to work throughout the strike and performed production work. During the week beginning June 8, 1959, the Company hired a large number of temporary employees who came to work with the express understanding that their jobs would terminate at the end of the strike. Returning strikers whose jobs had been abolished or had already been taken by other replacements were treated as permanent replacements for other strikers. (R. 37a, 396a, 399a, 522a).

D. *The Termination of the Strike*

On June 24, the Union suggested a formula for settlement of the remaining issues, which left the superseniority issue for resolution by the Board, and an apparent agreement was reached between the negotiators (R. 7a, 43a; 213a-215a). Following the meeting, the Union withdrew its picket line. Although the agreement did not then materialize, the strike nonetheless came to an end (R. 7a, 43a; 215a).

The Company thereupon informed the Union that it considered 129 strikers as permanently replaced, and set forth its policy with respect to the recall of strikers, providing that strikers would be recalled as available jobs became vacant (R. 144a-145a, 547a, 571a). Under provisions of the expired collective bargaining agreement, which were not changed during negotiations, returning strikers could not bump employees who worked during the strike, and strikers were eligible for recall only to available job openings (R. 412a-415a).

Following termination of the strike the 140 non-unit employees who had performed production work during the strike returned to their regular jobs outside the bargaining unit, and the temporary employees were terminated. Those employees who were on layoff at the start of the strike and returned to work as replacements during the strike as well as strikers who returned to work during the strike continued to work with 20 years added to their former seniority for purposes of layoff and recall. Newly hired permanent replacements were also credited with 20 years' additional seniority.

During the weeks which followed, strikers were recalled in increasing numbers. The actual seniority of the recalled strikers ranged down to 15 years in July and subsequently strikers with 13 or 14 years seniority were recalled. (R. 46a-47a; 171a, 176a, 399a-403a, 523a).

On or about July 1, after the Company had informed employees in the plant that they were free to withdraw from union membership, the Union began to receive a number of withdrawals of union membership from those employees who were working in the plant (R. 16a, 47a-48a; 260a, 263a, 437a).

E. *The Post-Strike Negotiations and Layoffs*

Negotiations continued until July 17, 1959, when an agreement was executed leaving the superseniority issue unresolved and leaving it to the Board and courts for ultimate resolution (R. 7a, 8a, 44a; 578a).

In the period from October 1959 to January 1960, there were a number of economic layoffs of bargaining unit employees. At that time a number of employees who had been strikers were laid off while nonstrikers with less actual service were retained as employees solely by virtue of the 20 years superseniority which the Company granted them for having worked during the strike. (R. 7a, 47a; 176a, 350a, 523-524a).

II. The Decision and Order of the Board

The Board unanimously found that the grant of superseniority to the nonstrikers was a form of discrimination which went far beyond the employer's right to replace economic strikers and was in direct conflict with the express provisions of the Act prohibiting discrimination. (R. 11a-17a). The Board concluded that in view of the consequences to employee tenure which flowed from the grant of superseniority, discouragement of union activity and membership was inevitable. Specific evidence of a discriminatory motivation was therefore not necessary to establish violation of Section 8(a)(3) of the Act. (R. 17a-18a). The Board found that the violation could not be off-

set by the claim that it was necessary to grant superseniority in order for the employer to protect his business interests (R. 18a-19a). Accordingly, the Board found it unnecessary to decide whether it was in fact necessary to offer superseniority to secure replacements in this case or whether the Company had an express discriminatory intent for instituting superseniority (R. 19a, fn. 29). The Board found additionally that the offer of superseniority to strikers to abandon the strike constituted an independent violation of Section 8(a)(1) of the Act, and that the insistence upon superseniority as a condition of reaching an agreement, constituted a violation of Section 8(a)(5) of the Act (R. 19a-20a). The Board also concluded that the unfair labor practices prolonged the strike, thereby converting the economic strike into an unfair labor practice strike from May 29, 1959, on (R. 20a-22a). It issued an appropriate order based on these findings. (R. 23a-28a).[2]

III. The Decision of the Court of Appeals

The Court of Appeals denied enforcement of the Board's order, concluding that an intent to discourage union membership or activity could not be inferred from the institution and application of the preferential seniority policy if the reason for its institution was to enable the employer to continue its operations during the strike. The court viewed a grant of preferential seniority to nonstrikers to continue an employer's business as a "concomitant right" . . . "inherent in the right of an employer to replace strikers during a strike." (R. 17-21.)

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[2] In the event this Court determines that the adoption of the superseniority policy and the layoffs pursuant to it were unlawful then the subsidiary findings of the Board with respect to the refusal to bargain and the conversion of the strike to an unfair labor practice strike should be reinstated and the entire order of the Board enforced. See *N.L.R.B. v. Wooster Division of Borg Warner*, 356 U.S. 342.

SUMMARY OF ARGUMENT

I. Whenever the Board has been confronted with a grant of preferential seniority favoring all those who reported to work during a strike as opposed to those who adhered to the strike, the Board has found a violation of Section 8(a)(1) and (3).

The proscription of Section 8(a)(3) against discrimination to encourage or discourage union membership applies to two principal groups of cases. In the first group, the question to be resolved is whether in the alteration of some aspect of an employee's hire or tenure of employment the action was based on his union activity or on any other reason unrelated thereto. In such cases specific evidence of an employer's anti-union motivation is usually necessary to resolve this question.

In the second group of cases, the alteration of an aspect of the employment relationship is based directly on some form of union activity. In these cases discrimination occurs which inherently discourages or encourages union membership, and specific evidence of an intent to discourage membership by discrimination becomes unnecessary for a finding that Section 8(a)(3) has been violated. *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 43-45.

In cases which fall in the second group, the fact that an employer acted to protect a business interest, even where substantial economic necessity can be shown, does not preclude a finding that the intent necessary to establish a violation of Section 8(a)(3) is present. *Radio Officers' Union* v. *N.L.R.B.*, *supra*; *N.L.R.B.* v. *Gluek Brewery Co.*, 144 F. 2d 847 (C.A. 8); *N.L.R.B.* v. *Hudson Motor Car Co.*, 127 F. 2d 528 (C.A. 6).

In this case the Court of Appeals failed to observe the distinction between the two principal groups of cases arising under Section 8(a)(3). It is clear from a comparison

of the instant case with the *Gaynor News* case, one of the three cases disposed of in the *Radio Officers* opinion, *supra*, that this case falls in the second group of cases described above. As in *Gaynor*, the discrimination with regard to hire or tenure of employment was based solely on union membership and inherently encouraged or discouraged union membership. The Board therefore properly found unavailing the protest of the employer that it acted for business reasons. 347 U.S., at 45.

That Congress intended such protests to be unavailing was confirmed by the 1947 amendments to the Act adopted by Congress. Congress adopted specific amendments designed to eliminate many of the pressures on employers which gave rise to the economic necessity which had been rejected as defenses by the Board. But Congress did not act to excuse an employer when it succumbed to these or any other pressures and engaged in discrimination.

The decision of this Court in *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.* 365 U.S. 667, affirms the principles set forth in *Radio Officers* and does not alter them. There in the absence of evidence establishing that there was discrimination, this Court concluded that discrimination could not be inferred. Nothing in its holding altered the principle that where discrimination has occurred based solely on union activity, the intent to discourage or encourage union activity is to be inferred.

Wholly apart from the violation of Section 8(a)(3), the Company's formulation and application of its seniority policy independently violated Section 8(a)(1) of the Act. The employees who struck were engaged in protected concerted activity in its most traditional form. The offer of preferential seniority to nonstrikers both promised the nonstrikers preferential treatment if they would refrain from the protected strike activity and threatened those who

continued to engage in the strike with permanent debasement of their job security. Such promises and threats constitute interference with, and restraint and coercion of, employees in the exercise of their protected rights of the most obvious form. Moreover, the implementation of the promises and threats after the strike was over constituted additional interference, restraint and coercion. Specific motivation or purpose to interfere with employees in the exercise of their rights is immaterial if the effect of an employer's conduct is to engage in such interference. *N.L.R.B.* v. *Illinois Tool Works*, 153 F. 2d 811 (C.A. 7); *N.L.R.B.* v. *McBride*, 247 F. 2d 124 (C.A. 10). Thus, the Board's consistent view that a grant of preferential seniority to nonstrikers violates Section 8(a)(1) and (3) is correct.

II. In *N.L.R.B.* v. *Mackay Radio Co.*, 304 U.S. 333, this Court stated that an employer has the right to protect and continue his business by filling vacancies left by strikers and is not bound at the conclusion of the strike to discharge those so hired in order to create vacancies for the returning strikers. In this case, the Court below found that the right to grant preferential seniority to non-strikers was concomitant to the right to replace strikers set forth in *Mackay*. However, preferential seniority, such as that granted nonstrikers in this case is of an entirely different character from the right to replace strikers as set forth in *Mackay* and carries with it vastly different consequences.

The impact of replacement of strikers is complete at the end of the strike. Only the strikers who were replaced are affected. Here the preferential seniority granted non-strikers only commenced to operate after the strike was over and had effect on the strikers who were not replaced and who returned to work after the strike. The result was that months after the strike was over, when layoffs for economic

reasons occurred, the selection of employees for layoff was dictated by the preferential seniority policy, and strikers with greater actual service were laid off in deference to shorter service nonstrikers. The impact of the additional seniority given nonstrikers will continue indefinitely in the future.

The difference between mere replacement and replacement with preferential seniority is not limited to the timing or duration of its impact. During the strike, the threat and inducement posed by superseniority is far more sweeping than that posed by mere replacement. An employee who does not fear replacement must fear, nonetheless, that his seniority rights may be subordinated to newly hired replacements for other employees or by junior employees who choose to cross the picket line. Likewise to a striking employee with relatively short service the inducement is proffered to cross the picket line and thus gain years of seniority over that of his fellow employees which he could never hope to attain under normal circumstances.

MacKay Radio itself draws the line between replacement on the one hand and discrimination in the terms and conditions of reinstatement of strikers on the other. Mackay held that the latter is proscribed. The preferential seniority granted in this case discriminated against strikers in the terms and conditions of their reinstatement and is proscribed under *Mackay*.

III. The discrimination inherent in the grant of preferential seniority to nonstrikers in this case cannot be justified unless the right to strike is to be rendered useless. If the employer may discriminate against strikers with regard to the terms and conditions of their employment upon conclusion of the strike in order to avoid the economic pressure which the strike places upon him, then it must follow that the more successful a strike, the less the protection of the right of employees to engage in it. The Act

so contrued would provide the right to engage in strikes without fear of discrimination only if they are ineffective.

Contrary to the view of the court below, in the relatively few cases in which business reasons have been found to justify discriminatory conduct which inherently encouraged or discouraged union activity, the basis of the decision was that there had been a collision of employee rights with employer rights which required a balance to be struck. *N.L.R.B.* v. *Truck Drivers Union No. 449*, 353 U.S. 87, 96. The decision in *Mackay Radio* is itself an example of a case in which such rights collided and were balanced. In each case where conflicting rights must be balanced, it is the function of the Board to strike that balance and its discretion is subject only to limited judicial review. Here the attack on employee rights is so fundamental and the rights attacked so clearly intended to be protected by the Act, that the Board was well within the limits of its discretion in refusing to subordinate employee rights. Indeed, to have done so would have altered the Act and warranted reversal. Accordingly, the unanimous decision of the Board below was correct, and its order should be enforced.

ARGUMENT

I. The Grant of Superseniority to Nonstrikers Discriminated Against Strikers and Interfered With Protected Activity in Violation of the Act.

A. *The Grant of Superseniority to Nonstrikers is Discrimination Which Inherently Discourages Union Membership in Violation of Section 8(a)(3) of the Act.*

Whenever the Board has been confronted with the separation of employees into two groups for seniority purposes, favoring all those who reported to work during a strike as opposed to all those who adhered to the strike,

the Board has found that separation unlawful. *Paper, Calmenson & Co.*, 26 NLRB 553, 557; *Precision Castings Co.*, 48 NLRB 870; *General Electric Co.*, 80 NLRB 510; *Potlatch Forests, Inc.*, 87 NLRB 1193, enforcement den. 189 F. 2d 82 (C.A. 9); *Olin Mathieson Chemical Corp.*, 114 NLRB 486, enf'd. 232 F. 2d 158 (C.A. 4), aff'd. 352 U. S. 1020; *California Date Growers Assn.*, 118 NLRB 246, enf'd. 259 F. 2d 587 (C.A. 9); *Ballas Egg Products*, 125 NLRB 342, enf'd. 283 F. 2d 871 (C.A. 6); *Swan Rubber Company*, 133 NLRB No. 31 enforced sub nom *N.L.R.B.* v. *Swarco*, 303 F. 2d 668 (C.A. 6), petition for certiorari pending; *Griffin Wheel Co.*, 136 NLRB No. 144. The underlying principle is succinctly stated in the *General Electric* case: "[E]xcept to the extent that a striker may be replaced during an economic strike, his employment relationship cannot otherwise be severed or impaired because of his strike activity." 80 NLRB, at 513. See also *N.L.R.B.* v. *J. Mitchko, Inc.*, 284 F. 2d 573, 576 (C.A. 3); *N.L.R.B.* v. *Industrial Cotton Mills*, 208 F. 2d 87, 91 (C.A. 4), cert. den. 347 U.S. 935.

Only the Ninth Circuit Court of Appeals and the court below have found lawful the distinction between groups of employees for seniority purposes on the basis of their strike activity. *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d 82.[3]

Section 8(a)(3) makes it an unfair labor practice "by discrimination in regard to hire or tenure of employment

[3] While there is some additional judicial expression of support for this view in *N.L.R.B.* v. *Lewin-Mathes Co.*, 285 F. 2d 329 (C.A. 7), the issue was not before the court and had not been raised by the complaint. See also *N.L.R.B.* v. *California Date Growers, Inc.*, 259 F. 2d 587, in which the Ninth Circuit reiterated its *Potlatch Forests* views, but affirmed the Board's finding that the grant of superseniority in that case was unlawful. The Ninth Circuit Potlatch decision was the subject of critical comment in a number of law review notes. See e.g. 27 U. Chi. L. Rev. 368 (1960); 6 Duke B. J. 143 (1957); 42 Va. L. Rev. 836 (1956); 30 Texas L. Rev. 776 (1952); 6 Rutgers L. Rev. 470 (1952); 9 Wash. & Lee L. Rev. 115 (1952); 4 Stan. L. Rev. 151 (1951).

or any term or condition of employment to encourage or discourage membership in any labor organization."

As this Court recognized in its opinion in *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, there are two principal groups of cases in which the application of Section 8(a)(3) comes into question. In the first and larger group fall those cases in which the question to be resolved is whether an act of discrimination was caused by union activity or was for any other reason. Typical of such cases are those in which it is charged that an employee was discharged for his union organizational activities and it is urged in defense that the discharge was unrelated to union activity but caused by faulty work performance, breach of plant disciplinary rules, an economic layoff or similar reasons. In these cases evidence of an employer's motive in taking action alleged to violate Section 8(a)(3) is usually essential to resolve that question, 347 U.S. at 43-44.

In the second group of cases the sole basis of discrimination between employees is their union activity. In these cases the discrimination inherently encourages or discourages union membership, and specific evidence of intent becomes unnecessary to a finding that Section 8(a)(3) has been violated, and indeed evidence that the employer was motivated by other considerations is "unavailing." 347 U.S. at 44-45. In some cases which fall in the second group, evidence of a desire to protect a business interest may be considered as justification or excuse for the violation of employee rights, but consideration of whether or not the protection of the employer's interests justifies his conduct comes into play only after there has been initial determination that employee rights have been infringed resulting in a collision between employee protected rights and employer rights which must be resolved. *N.L.R.B.* v. *Truck*

Drivers Local Union No. 449, 353 U.S. 87, 96. (See pp. 31-33, *infra*).

In this case, the Court of Appeals confused the question whether the employer's asserted economic reasons constituted the *basis* of its grant of superseniority with the question whether those reasons *justified* the grant. In so doing, it confused group 1 situations with group 2 situations, and in effect, held that whenever a significant economic purpose is advanced to justify discriminatory conduct, a violation of Section 8(a)(3) cannot be sustained. It thus usurped the function of the Board in assessing such justifications and held that the protection of an employer's economic right must always outweigh the protection of the right of employees to engage in union activity free from interference and free from discrimination based on such activity.

That this case falls in group two rather than group one appears readily from comparison of this case to the *Gaynor News* case, one of the three cases joined for disposition in the *Radio Officers'* opinion, *supra*.

In *Gaynor*, the company was charged with violation of Sections 8(a)(1), (2) and (3) by granting retroactive wage increases and vacation payments to employees who were members of the union and refusing such benefits to other employees because they were nonmembers. The union was recognized as the exclusive bargaining representative under a closed shop agreement, which permitted employment of nonmembers, however, under certain circumstances. The union was closed and nonmember employees were not eligible for membership. The Company made retroactive wage payments to union member employees in compliance with its agreement and in addition adjusted their vacation payments. It made no similar payments to nonmember employees on the ground that it was not contractually bound

to do so and in its business judgment did not choose to do so. The Court concluded that this discrimination, based solely on union membership, inherently encouraged union membership, and that evidence of the discrimination was alone sufficient to establish that Section 8(a)(3) was violated, 347 U.S. at 45. It was conceded "that the employer acted from self-interest and not to encourage unionism," 347 U.S., at 37. Nonetheless, the intent to encourage union membership was "sufficiently established" by the evidence of discrimination based on membership, and the violation was found.

Gaynor is indistinguishable from the instant case. There members were given additional pay and vacation benefits which nonmembers were denied. Here nonstrikers were rewarded with preferential seniority and adherents to the strike lost relative job rights of overwhelming significance. Both constitute clear discrimination, 347 U.S., at 39. There the discrimination was based solely on union membership. Here it was based solely on union activity—adherence to the strike. See 347 U.S., at 39-41.

The Court stated:

> "In holding that a natural consequence of discrimination, based solely on union membership or lack thereof, is discouragement or encouragement of membership in such union, the court merely recognized a fact of common experience—that the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action. No more striking example of discrimination so foreseeably causing employee response as to obviate the need for any other proof is apparent than the payment of different wages to union employees doing a job than to non-union employees doing the same job." 347 U.S., at 46.

It is a no less recognizable fact of common experience that the desire of employees to abandon union membership and activity "is directly proportional to the advantages thought to be obtained from such action." Equally striking an example of discrimination "foreseeably causing employee response as to obviate the need for any other proof" is the granting to nonstrikers of job protection against future layoff of a character impossible to attain at any other time or under any other circumstances, in relation to the job protection of one's fellow employees who are on strike. The foreseeability of this response is at its peak in an area of critical unemployment and acute economic depression.

Indeed in this case, as the Board found, the finding of discouragement of union membership need not stand on inference alone (R. 16a). From July 1 to July 17, at the instigation of the Respondent, 173 members withdrew from the Union, most within the first few days after July 1. These withdrawals came at a time immediately after the strike when practically all employees working were nonstrikers standing to benefit from the grant of superseniority to them.

In *Gaynor* it was conceded "that the employer acted from self-interest and not to encourage unionism." 347 U.S. 17, 37. Here the Employer protested that it similarly acted from self-interest and without any design to discourage unionism. As in *Gaynor*, that "protestation . . . must be unavailing." 347 U.S. at 45.

B. *A Finding That the Act Has Been Violated By Discrimination Based Solely On Union Activity Is Not Inconsistent With A Finding That The Employer's Purpose in Discriminating Was Economic*

Other cases falling in the second group with *Gaynor* confirm that an employer's acts to protect its business interests do not avail to preclude a finding of a violation if they discriminate between employees on the basis of union activity.

Thus, in *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U.S. 793, discharges and suspensions for violation of a rule prohibiting union solicitation were found to violate Section 8(a)(3). As this Court later observed, there "we noted that such employer action was not 'motivated by opposition to the particular union or, we deduce, to unionism,' and that 'there was no union bias or discrimination by the company in enforcing the rule.' " *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S., at 45. The Court continued:

> "But we affirmed the Board's holding that the rules involved were invalid when applied to union solicitation since they interfered with the employees' right to organize. Since the rules were no defense and the employers intended to discriminate solely on the ground of such protected union activity, it did not matter that they did not intend to discourage membership since such was a foreseeable result." 347 U.S., at 46.

In *N.L.R.B.* v. *Industrial Cotton Mills*, 208 F. 2d 87 (C.A. 4), at issue was the denial of reinstatement to an employee based on the mistaken belief that he was guilty of strike misconduct. The Court found it is "true that where denial of reinstatement results from the employer's reasonable and sincere mistake, there is no evil intention behind

the harm suffered by the employee." 208 F. 2d, at 91. Nonetheless, it concluded that the necessary intent was present to sustain a finding that the Act was violated.

In *Cusano, d/b/a American Shuffleboard Co.* v. *N.L.R.B.*, 190 F. 2d 898 (C.A. 3), an employer's mistaken belief that an employee made a false statement about the employer while engaging in protected activities did not preclude a finding that the discharge violated Section 8(a)(3). See also *General Motors Corp.* v. *N.L.R.B.*, 150 F. 2d 201 (C.A. 3), enf'g. 59 NLRB 1143; *Summit Mining Corp.* v. *N.L.R.B.*, 260 F. 2d 894, 897, 898 (C.A. 3).

In *Allis-Chalmers Mfg. Co.* v. *N.L.R.B.*, 162 F. 2d 435 (C.A. 7), the employer reclassified inspectors, after they selected a bargaining representative, in order to retain control of inspection by management. The Court enforced the Board's decision that the reclassification violated Section 8(a)(3), finding it "enough to say that whatever purpose an employer may have in demoting or otherwise adversely affecting the employment status of his employees who engage in lawful union activity, so long as that action would not have been taken in the absence of such union activity, the employer thereby necessarily discourages membership in the labor union organization involved . . ." 162 F. 2d at 440.

Cases which fall in this group are not limited to the case of mistaken belief or to business decisions of relatively minor importance which result in discrimination based solely on union activity. In *N.L.R.B.* v. *Gluek Brewing Company*, 144 F. 2d 847 (C.A. 8), cited in *Radio Officers'* as a case typical of this group, 347 U.S., at 45, n. 53, the discrimination occurred to avoid a boycott and intimidation which threatened the employer with substantial economic loss unless it discriminated against employees because of their union affiliation. There, the court found the dis-

crimination unlawful, even though it was "clear that [the employer] had no purpose—in the sense of animus or desire—to injure one [union] or help the other. Its underlying and compelling purpose was to save itself." 144 F. 2d, at 853.

Similarly, in *N.L.R.B.* v. *Hudson Motor Car Company*, 128 F. 2d 528 (C.A. 6), the Court affirmed a finding of violation of Section 8(a)(3), when fear of disruption and economic reprisal by a majority union caused the employer to discriminate against minority union adherents. The Court stated:

> "We think it right and just to say that so far as the record shows, respondent has not wilfully violated the provisions of the Act, but the intent of the employer is not within the ambit of our power of review. When it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives." 128 F. 2d, at 553.

To the same effect are *N.L.R.B.* v. *Star Publishing Company*, 97 F. 2d 465, 471, (C.A. 9); *N.L.R.B.* v. *Newspaper and Mail Deliverers Union*, 192 F. 2d 654, 656 (C.A. 2); *N.L.R.B.* v. *Oertel Brewing Co.*, 197 F. 2d 59, 62 (C.A. 6); *N.L.R.B.* v. *Pappas & Co.*, 203 F. 2d 569, 570.

The very formulation of Section 8(a)(3) is indicative that Congress did not intend to require a specific motive to encourage or discourage union activity in every case. If it had such an intent, it would have been a simple matter for Congress to proscribe discrimination "for the purpose of" encouraging or discouraging union activity.

That Congress intended that the defense of economic motive to discrimination based solely on union activity be

rejected is confirmed by the 1947 amendments to the Act. Thus, Congress adopted specific amendments designed to eliminate many of the pressures on employers which had given rise to the economic necessity raised as defenses in these cases. Sections 8(b)(1)(A) and 8(b)(2) were enacted to eliminate union pressure to cause favoritism to one union over another or to cause discrimination against employees for nonmembership or other union activity. Section 8(b)(4) was enacted to outlaw secondary boycotts, jurisdictional strikes and other pressures upon employers with which they could not cope through collective bargaining. But Congress enacted no legislation to immunize an employer who succumbed to such pressures or to any others to the detriment of the rights of employees because of economic necessity. Congress clearly understood that the employer's motive was unimportant when he was caused unwillingly to encourage or discourage union membership by discrimination in violation of Section 8(b)(2). But discrimination resulting from yielding to such pressure continued to be an unfair labor practice. See e.g. *N.L.R.B.* v. *Imparato Stevedoring Co.*, 250 F. 2d 297, 302 (C.A. 3); *N.L.R.B.* v. *Richards*, 265 F. 2d 855 (C.A. 3).

The Congressional intent was to eliminate pressures which if considered unjustifiable, not to erode employee rights by permitting self-help whenever an employer found pressure burdensome.

Nothing in the decision of this Court in *Local 357, International Brotherhood of Teamsters* v. *N.L.R.B.*, 365 U.S. 667, alters this long line of clear precedent. In the face of an express disclaimer of discrimination against casual employees because of presence or absence of union membership, this Court concluded that a hiring hall agreement could not be found discriminatory *per se*, and *discrimination* therefore could not be assumed without specific evidence.

In the Board's underlying decision, it had conceded that hiring hall agreements were not *per se* unlawful, but held that in the absence of certain safeguards against their misuse, discrimination could be inferred even in the absence of evidence of motive. 365 U.S., at 671-672. However, as operation of the hiring hall could be based either upon the legitimate grounds which justify the operation of hiring halls or upon considerations relating to union membership or activity,[4] application of the hiring hall agreement presented a typical group one situation. Therefore, specific evidence of motivation was necessary to establish that there had been discrimination.

Similarly in *Pittsburgh Des Moines Steel Co.* v. *N.L.R.B.* 284 F. 2d 74 (C.A. 9), the bonus plan which the Court of Appeals found lawful was capable of application to discriminate against employees because of their union activity, but its terms made its application dependent upon a number of factors, some of which were unrelated to union activity and others of which were only incidentally affected by union activity. Thus, proof of specific anti-union motivation or that no criteria other than the union activities of employees were in fact involved in the application of the plan was necessary. Such proof was lacking.[5]

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[4] It was clear from the legislative history that the operation of a union hiring hall was not itself union activity on the basis of which discrimination is banned 365 U.S., at 672-674. If this were not the case, then all having hiring hall agreements would discriminate against employees on the basis of union activity—i.e., their failure to seek employment through the hiring hall—and discrimination would have been present.

[5] While the result in *Pittsburgh Des Moines* is consistent with the decision of the Board in this case, we respectfully disagree with the reasoning of the Court that an employer may act to remedy a business condition which is caused by protected activity when the action results in the segregation of employees into two classes based solely upon their participation in union activity. While a strike may justify curtailment of operations due to a loss of business, it cannot justify selection of employees for layoff based on their participation in the strike. See *N.L.R.B.* v. *Richards*, 265 F. 2d 855, 860 (C.A. 3).

Here, as in *Radio Officers*, discrimination was express in the Company's statement of policy and in the Company's choice of employees for layoff pursuant thereto. As in *Radio Officers*, the foreseeable consequence of this discrimination was discouragement of union membership, and all the elements necessary to establish a violation of Section 8(a)(3) were present.

C. *The Grant of Superseniority to Nonstrikers Independdently Interferes With Employee Rights in Violation of Section 8(a)(1).*

Wholly apart from the violation of Section 8(a)(3) the Company's conduct in formulating and applying its superseniority policy independently violated Section 8(a)(1) of the Act. Section 8(a)(1) proscribes interference with, or restraint or coercion of, employees in the exercise of their Section 7 rights. Section 7 confers upon employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining."

The employees who struck were engaged in traditional protected concerted activity within the meaning of Section 7. The offer of superseniority to nonstrikers combined both a promise to nonstrikers and a threat to those who continued to strike. To those who abandoned the strike, it promised otherwise unattainable seniority protection against future layoff conditioned solely upon their abandonment of the strike. To those who continued to strike, it threatened debasement of earned seniority by the artificial elevation of less senior employees above them for purposes of layoff and recall, solely because they, the strikers, elected to continue to engage in their protected concerted activity. Such promises and threats constitute the most obvious

form of interference, restraint and coercion. *N.L.R.B.* v. *James Thompson & Co.*, 208 F. 2d 743, at 748 (C.A. 2); *American Rub' - Products Corp.* v. *N.L.R.B.*, 214 F. 2d 47, 54 (C.A. 7); *N.L.R.B.* v. *Wheeling Pipe Line, Inc.*, 229 F. 2d 391, 392 (C.A. 8); *N.L.R.B.* v. *Trinity Valley Iron & Steel Co.*, 290 F. 2d 47 (C.A. 5), enforcing 127 NLRB 417; See also *N.L.R.B.* v. *Spiewack et al.*, 179 F. 2d 695, 696-7 (C.A. 3). The implementation of the promises and threats through enforcement of the policy, thus rewarding nonstrikers and penalizing strikers because of their concerted activities, is a further violation of Section 8(a)(1). *N.L.R.B.* v. *James Thompson & Co.*, 208 F. 2d 743, 748. When viewed as an independent violation of Section 8(a)(1), specific motive or purpose is immaterial if the conduct in question may reasonably be said to tend to interfere with, restrain or coerce employees in the exercise of concerted protected activity. *N.L.R.B.* v. *James Thompson Co. supra; Time-O-Matic* v. *N.L.R.B.*, 264 F. 2d 96 (C.A. 7); *N.L.R.B.* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7); *N.L.R.B.* v. *McBride*, 274 F. 2d 124, 126 (C.A. 10).

II. The Right to Grant Superseniority to Nonstrikers Is Not Conferred by the Mackay Radio Decision

The decision of this Court in *N.L.R.B.* v. *Mackay Radio Co.*, 304 U.S. 333, affirmed a decision of the Board that the discriminatory selection of strikers for replacement violated Section 8(3) of the Wagner Act. In reaching its conclusion the Court noted that it did not follow from Section 13 of the Act "that an employer guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for

them." 304 U.S., at 345-346. The Board had not held to the contrary, and the substance of this observation was not in issue in that case, nor is it in issue here, for even absent the superseniority policy, the employer was not bound to discharge the strike replacements upon termination of the strike to make place for returning strikers.

While the Court added in *Mackay* that "The assurance by respondent to those who accepted employment during the strike that . . . their places might be permanent was not an unfair labor practice," 304 U.S., at 346, nothing in the *Mackay* decision justifies interpretation of the word "permanent" to mean more than assurance that the replacements would not be displaced by returning strikers. This was the only assurance given in the *Mackay* case. The semantic argument that "permanent" as used therein means assurance against any future layoff not only goes beyond what the facts of that case warrant, but beyond the guarantee that an employer could fulfill, for future economic decline might require the layoff of replacements or the cessation of operations. As demonstrated below, such a commitment would also result in substantial infringement of employee rights beyond that which flows from the assurance against displacement by returning strikers. Under these circumstances, it is clear that the interpretation which does least violence to protected rights was intended.[6]

Superseniority, as that term is used in this case, involves more than permanent replacement. Here, a great number

[6] The semantic argument based on the word "permanent" must fail in this case for the further reason that the Company showed no such understanding of permanence when it assured replacements of their tenure. The assurance which Company representatives repeatedly testified was given to replacements was that they would not be laid off as a result of settlement of the strike. (R. 171a, 172a, 174a, 342a, 343a, 346a, 367a, 416a, 435a, 454a). This is the same assurance of permanence as that in the *Mackay* case.

of strikers were replaced. But the impairment of strikers' rights went beyond replacement. The procedures for layoff and recall provided for selection of employees for layoff and recall in order of seniority, as is typical in collective bargaining agreements. Following the end of the strike many strikers returned to work whose service with the Company was less than 20 years and as low as 13 years. Several months later for economic reasons, there were layoffs. Because of the twenty years additional seniority given the nonstrikers by the Company, the employees who worked during the strike, some of whom had only several months actual service, and most of whom had less than thirteen years service, were retained in preference to employees who had exercised their right to strike and had as much as twenty years actual service. Thus, not only were replacements not displaced to make room for returning strikers, but long after the replaced strikers had been turned away from the plant, an additional group of strikers was laid off, while nonstrikers were preferred for retention solely on the basis of the additional seniority, or superseniority, given them for having worked during the strike.

Unlike mere replacement, then, superseniority is not limited in its impact to the duration of the strike or to the group of strikers who are replaced. Replacement may affect any individual employee who finds at the end of the strike that he has been replaced, but once the strike is over, replacement poses no further threat to those who have returned to work, and the impact of a replacement program is at its end. On the other hand, superseniority has impact which continues indefinitely into the future. It affects substantially all employees who engage in a strike, whether or not they are replaced on their jobs. When superseniority is granted nonstrikers by an employer, strikers face more than the possibility that they may be permanently replaced

during the strike. Following the termination of the strike their seniority rights earned through years of toil are permanently diluted and subordinated to those of employees who crossed the picket lines during the strike, whose days of strike-breaking work will outweigh years of strikers' service.

The difference between permanent replacement and replacement with superseniority based on abstinence from strike activity makes itself felt during the strike as well. During a strike the grant of superseniority constitutes a threat and an inducement to striking employees far more pervasive than mere permanent replacement. As to senior employees who would normally feel that their long experience would make their replacement unlikely, superseniority raises the threat that junior employees or new hires may, by the mere act of crossing the picket line, make the senior employees subordinate in seniority. As to junior employees, laid off employees, or prospective replacements, the promise of superseniority offers them a once in a lifetime chance to achieve protection against layoffs that they could never hope to achieve in normal circumstances in relation to their fellow senior employees. The specters consisting of both threat and promise, raised by superseniority, constitute a potent divisive force and inducement to abandon the strike and union activity. (See pp. 25-26, *supra.*)

Finally, the application of the *Mackay* decision to superseniority proves too much and is contrary to the holding of *Mackay*. If superseniority for nonstrikers is merely an adjunct of the right to replace strikers sanctioned in *Mackay*, then the grant of superseniority to nonstrikers would be permissible in any economic strike without the need to demonstrate economic necessity for its institution. For the right of an employer to replace permanently any

economic striker does not require a demonstration by an employer that it was necessary for him to give assurances against displacement in order to continue his business. If *Mackay Radio* validates a grant of superseniority to nonstrikers, then it must follow that an employer may similarly grant superseniority to nonstrikers in any economic strike without a demonstration of economic necessity. See *N.L.R.B.* v. *Potlatch Forests, Inc.*, 189 F. 2d, at 86.

The extension of *Mackay* by the Court below, moreover, ignores the very holding of that case. Thus, while the dictum in *Mackay* affirmed the right to replace strikers permanently during a strike, the holding of the case was that the employer in that case had violated the Act by discrimination against strikers because "Any . . . discrimination in putting [unreplaced strikers] back to work is . . . prohibited by Section 8." 304 U.S., at 346. Here, by virtue of the preferential seniority granted nonstrikers, the strikers were discriminated against because of their strike activities when they were put back to work in that their relative seniority was permanently impaired because they adhered to the strike and many ultimately lost employment because of it. Thus, *Mackay* sets forth the very basis for distinguishing permanent replacement from superseniority for nonstrikers—the distinction between conduct which does not discriminate against those who are employees after termination of the strike and that which does.

There is no warrant for reading *Mackay Radio* to alter so drastically its impact, nor is there the slightest indication that Congress intended employee rights to be so impaired. (See pp. 33-34, *infra*.) *Mackay Radio* provides only "that an employer guilty of no act denounced by the statute" may protect and continue his business. The application of *Mackay* to sanction superseniority to nonstrikers would permit performance of "an act denounced

by the statute" in the name of protection and continuation of an employer's business.

III. The Board Has Correctly Refused to Find That a Business Purpose Justifies a Grant of Preferential Seniority to Nonstrikers.

The discrimination inherent in a grant of preferential seniority to nonstrikers goes to the very heart of the Act and cannot be justified without hollowing the right to strike and defusing the only economic weapon given employees with which to support their collective bargaining goals. For the consequence of the conclusion of the court below that a business purpose for granting preferential seniority to nonstrikers removes such discrimination from the scope of Section 8(a)(3) is sweeping. In that event, a lawful strike which succeeds in exerting economic pressure on an employer unleashes an employer from observance of the requirements the Act would otherwise impose and sanctions any form of preferential treatment to nonstrikers deemed necessary to bring about easing the pressure generated by the strike through the inducement of strikers and replacements to ignore the strike.

The error of the court below stems from its failure to recognize the basis of the relatively few cases in which the conclusion has been reached that business reasons have justified discriminatory conduct which inherently encouraged or discouraged union membership or activity. This conclusion flowed not from a finding that employee rights were not infringed, but from recognition that there had been a collision of employee rights with employer rights which required a balance to be struck. *N.L.R.B.* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96. As the citation of *Mackay Radio* in that case confirms, *Mackay* is an

example of a case presenting such a collision of rights.[7] 353 U.S. at 96, fn. 27.

In each case where such conflicting interests are to be balanced,

> "The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *N.L.R.B.* v. *Truck Drivers Local Union No. 449*, 353 U.S., at 96.

In that case this Court, in affirming the balance struck by the Board and reversing the reviewing Court of Appeals, cautioned against "too narrowly confining the exercise of the Board's discretion." 353 U.S. at 97.

Where the balance has been struck in favor of employer interests, apart from *Mackay*, typically the conflicts have concerned the right to engage in a defensive lockout in response to strike activity or to strike an accommodation between organizational rights and an employer's rights to maintain discipline and order. See e.g. *N.L.R.B.* v. *Truck Drivers Local Union No. 449, supra; N.L.R.B.* v. *Babcock &*

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[7] The Court below read *Mackay* to mean that the existence of a business reason negated the conclusion of proscribed discrimination which flowed from the acts of discrimination based solely on union activity. (R. 21). Thus, by overlooking the fact that *Mackay* resulted from a balancing of conflicting interests, the Court ignored the distinction between group one and group two cases (pp. 16-17, *supra*) and concluded that unlawful discrimination could not exist in the face of a business motivation for the discriminatory acts. The fact that these cases require a balancing of conflicting interests is further demonstration that the distinction between group one and group two cases is correct. For if, as the court below held, the existence of a business purpose negates the inference of intent to encourage or discourage union activity, then it would never be necessary to balance interests, and the balancing cases would have been decided in favor of the employers on the basis of the mere showing of the employer's economic motivation. See e.g. *Quaker State Oil Co* v. *N.L.R.B.*, 270 F. 2d 40, cert. den. 361 U.S. 917.

Wilcox Co., 351 U. S. 105; *Republic Aviation Corp.* v. *N.L.R.B.*, 324 U. S. 793; *N.L.R.B.* v. *Continental Baking Co.*, 221 F. 2d 427, (C.A. 8); *Betts Cadillac Olds, Inc.*, 96 N.L.R.B. 268; *International Shoe Co.*, 93 NLRB 907.

The Court below, misconstruing *Radio Officers'* and *Mackay Radio* and failing to recognize *Mackay* as a balancing case, inadvertently exceeded the scope of the review available to it and too narrowly confined the exercise of the Board's discretion.

Clearly the Board acted within the limits of its discretion in rejecting the proffer of economic necessity as a defense. Notwithstanding the amendments to the National Labor Relations Act since it was passed in 1935, the basic objective of the Act remains to insure to workers the right to organize themselves and to engage in collective bargaining. A fundamental policy expressed in Section 1 of the Act is to endow unions with collective bargaining powers and to redress the bargaining disadvantage of individuals which would exist without the protection of the Act. Among the key rights specifically protected by the Act is the right to strike guaranteed by Section 13. The Act underscores the protection of those who exercise that right by preserving in Section 2(3) their employee status while they strike and by outlawing in Section 8(a)(3) discrimination against them to discourage or encourage union membership.

Congress considered the protection of employee rights important not only for the direct benefit of the employees concerned, but also because of the general benefit to the public welfare to be derived from collective bargaining and the improvement of wages, hours, and working conditions resulting therefrom. (Section 1 of the Act, Findings and Policies.) Congress sanctioned strikes mindful of their impact upon employers, but with the knowledge that col-

lective bargaining could exist only where the right to strike existed to give substance to the Congressional effort to create bargaining equality.

Congress has twice amended the National Labor Relations Act since its passage. On both occasions, through the enactment of Section 8(b) in 1947, and the amendment and extension of Section 8(b) and the enactment of Section 8(e) in 1959, Congress has significantly circumscribed the kinds of economic pressure which may be placed on employers in conjunction with strike activity. As a result the kinds of economic pressure which may be imposed upon employers have largely been reduced to those effected through the withholding of the services of the employees of the struck employers.

In the light of the direct action taken by Congress to narrow and reduce the economic pressure which may lawfully be placed on an employer in an economic strike, the inference must be drawn that Congress intended to preserve unabridged the right to impose full economic pressure through the remaining avenues. Congress has amply demonstrated that it knows how to redress what it has felt to be improper or excessive pressures upon an employer.[8] It took no action to permit an employer to undermine employee solidarity and relieve the pressure generated from withholding of services by permanently discriminating against strikers with respect to the terms of their reinstatement after the strike is over.

Indeed, in no case known to the Union has the balancing

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[8] See House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., and particularly pp. 12, 23-24, 27-28, 30, 44, 1 Legislative History of the Labor-Management Relations Act, 1947 (G.P.O., 1948), pp. 292, 303, 314, 315, 318-319, 321, 335; Senate Report No. 105 on S. 1126 80th Cong., 1st Sess., and particularly pages 7 8, 20, 21-24, 25, 28, 1 Leg. Hist. 407, 413-414, 426, 427-430, 431, 434. That Congress did not intend to impair otherwise the right to strike effectively appears as well in the remarks of Senator Taft at 93 Cong. Rec. 3835, 2 Leg. Hist. 1007.

concept been applied to permit an employer's interest to override protected employee rights so as to create a continuing impairment of their terms and conditions of employment based upon participation in concerted activity. In *Mackay* and in the lockout cases cited above, at the conclusion of the strike or lockout, employees who returned to work were restored to their full rights.

Yet in this case, in addition to the lasting discrimination inherent in preferential seniority (pp. 28-29, *supra*), such a policy impairs future collective bargaining, the ultimate goal of the exercise of employee rights, and makes bargaining "difficult, if not impossible," as the Board recognized in its decision. (R. 15a.) Not only is a permanent division created between strikers and nonstrikers, but the preferential seniority policy stands as a monument to deter employees ever from striking again and thus to deprive them of any effective economic force in future negotiations, contrary to the understanding of Congress that the right to strike is essential to collective bargaining.

The balance was struck in *Mackay* to permit permanent replacement on the one hand, but to proscribe discrimination in regard to hire or tenure of employment upon reinstatement on the other. (See p. 30, *supra*.) Congress has evidenced no intention that this balance be changed. Clearly, the Board did not exceed its discretion in concluding that this balance should be continued. Indeed, in the light of the history of the Act since it was adopted, a different balance would usurp the function of Congress and impair the right to strike which Congress intended to preserve.

In *N.L.R.B.* v. *Drivers Local No. 639*, 362 U.S. 274, this Court stated:

> "Section 13 is a command of Congress to the Courts to resolve doubts and ambiguities in favor of an inter-

pretation of Section 8(b)(1)(A) which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act."

Section 13 is no less a command to interpret Sections 8(a)(1) and 8(a)(3) to safeguard the right to strike.

CONCLUSION

For the reasons set forth above, the decision of the court below should be reversed and the order of the Board enforced.

Respectfully submitted,

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APPENDIX A

Statutes Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151 et seq.), are:

"Sec. 2. When used in this Act—

. . .

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . .

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

"Sec. 8(a). It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to

require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a) . . .

"Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."